

# Emergency Projects

## Environmental Process and Requirements

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### 1. What is an “Emergency” for Environmental Compliance Purposes?

One of the most important elements of an emergency under environmental laws and regulations is that the event be sudden or unexpected. Natural disasters, catastrophes or events such as storms, floods, fires, earthquakes, tsunamis (tidal waves), or volcanic action are included in the definition of emergency. Responses to man-made disasters such as large-scale civil unrest, sudden hazardous material and chemical spills, explosions, and acts of war or terrorism are also included in the definition of emergency. Gradual and progressive deterioration or lack of proper maintenance does not qualify as an emergency. Closing a facility because of danger of imminent collapse or damage is not considered an emergency; actual failure is necessary. The second important element is that immediate response is necessary to prevent or lessen loss of, or damage to life, health, property, or essential public services.

It is essential to note that the definition of emergency for environmental compliance and federal-aid emergency relief differs from the definition used for emergency contracting purposes. California Public Contract Code, Section 10122(a), which authorizes Director's Orders for emergency contracting, includes “threat of failure” as an emergency. For federal aid assistance and under most environmental laws, threat of failure does not qualify as an emergency. This means that environmental approval and permitting will still be needed for some Director's Order projects.

In addition, while a governor's proclamation of a state of emergency, is enough to exempt a project under the California Environmental Quality Act (CEQA); a categorical exclusion will still be needed for compliance with the National Environmental Policy Act (NEPA). Please see question # 3 below for additional information regarding environmental documentation for emergency projects.

### 2. Can Work Begin in Response to an Emergency Before an Environmental Document is Prepared and Permits/Approvals are Obtained?

YES. State and local transportation agencies are empowered to begin emergency repairs (a.k.a. emergency openings--EO) immediately. Emergency repairs (emergency opening work) are repairs made during and immediately following a disaster to restore essential travel, to minimize the extent of damage, to protect the remaining facilities, and to ensure public safety where this is imminent danger. Permanent repairs (a.k.a. permanent restoration) and betterments will need to wait for environmental compliance (normal federal-aid NEPA procedures). As soon as possible and concurrent with the repair, the environmental document and any needed permits and approvals are prepared and/or obtained. Environmental staff should be invited to and should attend the initial field review of the emergency repair site. Note: The fact that the Governor and/or the District Director have declared an “emergency” does not guarantee that the damaged facilities will be eligible for FHWA Emergency Relief funding.

For a detailed discussion of FHWA's emergency relief funding including details on the [distinction between “emergency repairs” and “permanent repairs”](#) see the Federal Highway Administration [Emergency Relief Manual](#). The FHWA CA Division also has a list of [frequently asked questions and electronic files of the needed forms](#).

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#### 3. What Type of Environmental Document is Needed for Emergency Repairs (Emergency Openings)?

##### National Environmental Policy Act (NEPA) and FHWA Regulations

Repair projects under the Emergency Relief (ER) program must comply with the requirements of the National Environmental Policy Act (NEPA) of 1969. Emergency repairs to restore essential travel, minimize the extent of damage, or protect remaining facilities are normally classified as categorical exclusions under 23 CFR 771.117(c)(9), as are emergency projects to restore permanently the existing facility in-kind at the existing location, ref. 23 CFR Part 771.117(d). For emergency repairs (a.k.a. emergency openings) the [damage assessment form \(DAF\)](#) available at the FHWA CA Division website serves as the categorical exclusion. However, if impacts to protected or otherwise sensitive or high-value resources are possible, advance coordination with the appropriate local, State, and Federal resource agencies should be closely considered to avoid or minimize project delays or shutdowns. Also note that the DAF cannot be used for permanent repair work. The normal federal-aid procedures apply unless the permanent repair work is considered incidental (10%) to the emergency repair (emergency opening) work.

On occasion, an emergency relief project that includes a betterment, whether or not eligible for emergency relief funding, may require further NEPA review. Although on the surface a project may appear to qualify for a categorical exclusion, *certain betterments may need either an environmental assessment (EA) to determine whether or not the project will cause significant environmental impacts, or an environmental impact statement (EIS,) if significant impacts are predicted.* Consult with the FHWA engineer assigned to your district; they are required to approve all betterments.

See [Chapter 6 of the Emergency Relief Manual](#).

##### California Environmental Quality Act (CEQA)

Projects undertaken, carried out, or approved by a public agency to maintain, repair, or restore an existing highway damaged by fire, flood, storm, earthquake, land subsidence, gradual earth movement, or landslide, provided that the project is within the existing right of way of that highway and is initiated within one year of the damage occurring are statutorily exempt from CEQA. The Department's standard categorical exemption (CE) form also contains checkboxes and language for [statutory exemptions](#).

This exemption does **not** apply to:

- highways officially designated as state scenic highways (however, a statutory exemption may be used for highways that are "eligible" for scenic designation, but that have not been officially designated),
- any project undertaken, carried out, or approved by a public agency to expand or widen a highway damaged by fire, flood, storm, earthquake, land subsidence, gradual earth movement, or landslide.

Further, emergency projects on facilities damaged or destroyed in a disaster, for which the Governor has proclaimed a state of emergency, are also statutorily exempt. In some cases this statutory exemption is applicable even if the project involves historic resources. See [Section 15269\(a\)](#) of the CEQA Guidelines.

A Class I CE (CEQA Guidelines 15301 (c)) may be used for emergency projects IF: 1) repairs or minor alterations involve negligible or no expansion of an existing use or the facility; **and** 2) the project does NOT result in removal of a scenic resource including a stand of trees, a rock outcropping, or an historic buildings.

See [Public Resources Code Section 21080 et seq.](#) and [CEQA Guidelines Section 15269, 15300.2\(d\), and 15301\(c\).](#)

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#### **4. What if the Emergency Area Contains Sensitive Species or Habitat? Do Emergency Repairs (Emergency Openings) Require Permits and Approvals from Applicable Resource Agencies Prior to Work?**

If the emergency repairs (emergency openings) will require work in an area with sensitive species or habitat, work may commence without obtaining permits and approvals from the applicable resource agencies. However, consultation and coordination must begin either simultaneously with the emergency repair (emergency opening) work or as soon as practicable after the emergency opening is under control. Please see full discussion below.

##### Federal Endangered Species Act (FESA)

There is no exemption from consultation but there is a process for emergencies. 50 CFR Part 402.05 - (a) Where emergency circumstances mandate the need to consult in an expedited manner, consultations may be conducted informally through alternative procedures that the Director of US Fish and Wildlife determines to be consistent with the requirements of sections 7(a)-(d) of the Act. This provision applies to situations involving acts of God, disasters, casualties, national defense or security emergencies, etc. (b) Formal consultations shall be initiated as soon as practicable after the emergency is under control. The Federal Agency shall submit information on the nature of the emergency action(s), the justification for the expedited consultation, and the impacts to endangered or threatened species and their habitats. The service will evaluate such information and issue a biological opinion including the information and recommendations given during the emergency consultation.

Contact US Fish and Wildlife Service as soon as possible (usually within 48 hours) by telephone or facsimile followed by written correspondence. Once the emergency is under control formal consultation will be initiated if necessary.

The same procedures apply to emergency consultation with NOAA Fisheries as well.

For additional information, see the [Final ESA Section 7 Consultation Handbook](#).

##### Department of Fish and Game (DFG)—Section 2081 California Endangered Species Act (CESA)

Immediate emergency repairs (emergency openings) are exempt from consultation requirements set forth in Section 2081 of the Fish and Game Code and are subject to the same conditions listed above under CEQA. However, DFG must be notified within 14 days of the start of work. Concurrent with the emergency repairs, coordination with the DFG is necessary in the same manner outlined above for FESA.

See the text of [Section 2081](#).

##### Section 404 Clean Water Act

**NEW PUBLIC NOTICE:** The Los Angeles District of the Army Corp of Engineers has just reauthorized [Regional General Permit #63](#) for repair and protection activities in emergency situations.

Discharges not requiring permits:

33 CFR Part 323.4(a)(2) Maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, bridge abutments or approaches, and transportation structures. Maintenance does not include any modification that changes the character, scope, or size of the original fill design. Emergency reconstruction must occur within a reasonable period of time after damage occurs in order to qualify for this exemption.

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Nationwide Permit #3 (2002):

This nationwide permit covers the repair, rehabilitation, or replacement of any previously authorized, currently serviceable, structure or fill, or of any currently serviceable structure or fill authorized by 33 CFR 330.3, ... *provided the environmental impacts resulting from such repair, rehabilitation, or replacement are minimal. Currently serviceable means useable as is or with some maintenance, but not so degraded as to essentially require reconstruction.*

Note that there are several conditions to this nationwide permit.

See the full text of [nationwide permit 3 and conditions](#).

National Pollutant Discharge Elimination System (NPDES)

[Section 13269\(c\)](#) of the California Water Code waives the normal permitting requirements for discharges in emergency situations. However, the appropriate regional board must be contacted prior to commencing work.

Coastal Zone Requirements:

Emergency projects within the jurisdiction of the San Francisco Bay Conservation and Development Commission (BCDC) may begin prior to obtaining a coastal permit as long as the work begins within one year of the damage and BCDC must be notified within 1 working day after the commencement of the emergency repair. Emergency repairs to an existing highway located within the jurisdiction of a local coastal program or the California Coastal Commission may also begin prior to obtaining a coastal permit but the commission or local program must be notified 14 days after the commencement of the emergency repair. Projects to expand or widen a highway damaged by fire, flood, storm, earthquake, land subsidence, gradual earth movement, or landslide, however, do require a coastal permit. See [Government Code Section 66322.2\(d\)](#), [Public Resources Code Section 30600\(e\)](#) and [Public Resources Code 21080.33](#).

Department of Fish and Game (DFG)—Fish and Game Code Section 1600 Lake and Streambed Alteration Agreement

Similar to the federal ESA process, there is no exemption for Section 2081 (CESA), but coordination with DFG can be conducted informally and concurrently while responding to the emergency action followed by formal consultation as soon as practicable after the emergency is under control. Caltrans should submit information on the nature of the emergency action(s), the justification for the expedited consultation, and the impacts to endangered or threatened species and their habitats.

See text of [Section 1601\(f\)](#).

Cultural Resources

Section 106

If the repair or restoration work begins within 30 days of emergency or disaster, [36 CFR 800.12](#) requires agency officials to notify the SHPO and the Advisory Council on Historic Preservation of the emergency undertaking and if possible give them 7 days to comment.

After 30 days, the repair and restoration work must be reviewed in accordance with regular Section 106 procedures in 36 CFR 800.4 – 800.6.

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### **CEQA**

Most projects undertaken to demolish or replace property or facilities damaged as a result of a disaster for which a state of emergency has been formally declared by the Governor are statutorily exempt from CEQA (subdivision (b), Section 21080). Notwithstanding that exemption, actions in the aftermath of a disaster that might adversely affect historical resources are subject to State laws governing consideration of historical resources.

#### **Public Resources Code 5024.5**

This section stipulates that no state agency shall alter, transfer, relocate, or demolish a State-owned historical resource without providing the SHPO with a summary of the action and the opportunity to review and comment on the proposed action. This requirement applies even when the action is statutorily exempt from CEQA. In addition to the requirements to notify and consult with the SHPO under section 5028 (below), emergency actions involving State-owned historical resources requires notification and consultation under section 5024.5. SHPO should be informed immediately that the Department is consulting with them under 5024.5, provide a brief description of the impact to the resource, the emergency action taken, and that we will submit the appropriate paperwork and proposal for permanent report as soon as possible.

#### **Public Resources Code Section 5028**

This section provides that no structure listed in the National Register of Historic Places, the California Register, or a local register that has been damaged as a result of a natural disaster is to be demolished, destroyed, or significantly altered (except for alterations to preserve or enhance historic value) unless: (1) the structure represents "an imminent threat to the public of bodily harm or of damage to adjacent property," or (2) the action is approved by the SHPO. That section further establishes the procedure for review of proposed actions by the SHPO.

In the wake of an earthquake, flood, fire, or other natural disaster the local agency may only demolish or destroy those structures that are an "imminent threat." In all other cases, the local agency must notify and consult with SHPO immediately if there are damaged historical resources that may require demolition, destruction, or significant alterations.

### **Wild and Scenic Rivers**

Neither the Federal nor the State Wild and Scenic Rivers Act have specific exemptions for emergency projects. Contact the appropriate federal land management agency—Bureau of Land Management or the US Forest Service—and state agency—Resources Agency.

### **E.O. on Floodplain Management**

Section 8 of Executive Order 11988 states:

"Nothing in this order shall apply to assistance provided for emergency work essential to save lives and protect property and public health and safety, performed pursuant to sections 305 and 306 of the Disaster Relief Act of 1974 (...42 USC 5145 and 5146)."

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### **5. Will Mitigation Be Required For Impacts Due to the Emergency Repair (Emergency Opening) Work?**

Resource agencies will most likely require the Department to mitigate for impacts caused by the emergency repair (emergency opening) work. This does not mean, however, that the Department cannot do the work immediately. Environmental staff should work with maintenance and construction crews to implement avoidance and minimization measures whenever and wherever possible; however, restoring travel service is the number one priority during an emergency.

When possible, take photos of the work area prior to work commencing. These photos can be useful during consultation and coordination with resource agencies and are needed for the administrative record.

### **6. Are Mitigation Costs Reimbursable?**

Eligibility determinations for environmental mitigation measures can apply a general rule-of-thumb: if the mitigation measure is related to an emergency relief-eligible betterment, the mitigation measure is also eligible. For example, if a roadway grade raise to protect a facility from future flooding has been economically justified for emergency relief funding, then a mitigation feature associated with the grade raise, such as possible wetland restoration, would qualify for emergency relief funding. Conversely, if a "betterment" is not justified for emergency relief funding, then any added mitigation features related to the betterment would likewise not be eligible for emergency relief funding but instead should be funded from regular apportioned Federal-aid highway funds. See [FHWA Emergency Relief Manual, Chapter 2](#) for additional information.

### **7. What Happens After the Immediate Emergency Repair (Emergency Opening) Work is Complete?**

Once the immediate emergency work is complete, all environmental processes and approvals revert to the standard requirements. Permanent repairs, especially betterments or work in new locations, must go through the standard environmental processes in compliance with all the applicable laws, regulations and executive orders.

For additional guidance, see [FHWA Emergency Relief Manual](#).